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A Survey Of Recent Developments In The Law: Tort law

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II. TORT LAW

A. *The Tort of Invasion of Privacy Finally Recognized in Minnesota*

On July 30, 1998, Minnesota joined the majority of other jurisdictions by recognizing the tort of invasion of privacy.[1] In *Lake v. Wal-Mart Stores, Inc.*,[2] the Minnesota Supreme Court recognized that the right to privacy exists in the common law of Minnesota.[3] Specifically, the court recognized causes of action in tort for intrusion upon seclusion,[4] appropriation,[5] and publication of private facts.[6] However, the Minnesota Supreme Court declined to find the tort of false light publicity a recognizable tort in Minnesota.[7]

The tort of invasion of privacy developed from the common law right to privacy which Samuel Warren and Louis Brandeis first

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1. *See* Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 232 (Minn. 1998). Prior to this decision, Minnesota, North Dakota, and Wyoming were the only states that did not recognize some form of invasion of privacy, either by common law or statutory provision. *See id.* at 234.

2. 582 N.W.2d 231 (Minn. 1998).

3. *See id.* at 235.

4. *See id.* Intrusion upon seclusion is committed when one "intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns . . . if the intrusion would be highly offensive to a reasonable person." RESTATEMENT (SECOND) OF TORTS § 652B (1977).

5. *See Lake*, 582 N.W.2d at 236. Appropriation occurs when one "appropriates to his own use or benefit the name or likeness of another." RESTATEMENT (SECOND) OF TORTS § 652C (1977).

6. *See Lake*, 582 N.W.2d at 236. One is subject to invasion of privacy for publication of private facts when one "gives publicity to a matter concerning the private life of another . . . if the matter publicized is of the kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public." RESTATEMENT (SECOND) OF TORTS § 652D (1977).

7. *See Lake*, 582 N.W.2d at 235. False light publicity is committed when one:

> gives publicity to a matter concerning another that places the other before the public in a false light if. . . . (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of publicized matter and the false light in which the other would be placed.

RESTATEMENT (SECOND) OF TORTS § 652E (1977).

considered in a well-known 1890 Harvard Law Review article.[8] Georgia, in 1905, was the first jurisdiction to recognize the common law right to privacy in *Pavesich v. New England Life Insurance Co.*[9] The Georgia Supreme Court accepted the views of Warren and Brandeis and based its adoption of the right to privacy tort on natural law and the well-established right to personal liberty.[10] Most jurisdictions followed Georgia in recognizing the invasion of privacy tort using *Pavesich* and Warren and Brandeis' article as leading authority.[11] Other states provide statutory protection for the right of privacy.[12]

In *Lake,* Melissa Weber's sister took a photograph of Weber and Elli Lake naked together in the shower while on vacation in Mexico.[13] Following their vacation, Lake and Weber took five rolls of film to a Wal-Mart store photo lab in Dilworth, Minnesota, for developing.[14] When they picked up their pictures, there was a written notice stating that one or more of the photographs were not fully developed because the pictures contained nudity.[15] However, the nude photograph of Lake and Weber was allegedly developed and kept by a Wal-Mart employee or employees.[16]

Lake and Weber alleged that an acquaintance questioned their sexual orientation and referred to the nude photograph five months after the developing.[17] They also claimed that a friend informed them that a Wal-Mart employee showed the photograph to her.[18] One or more copies of the photograph were known to be floating around the community.[19] Lake and Weber brought an action for invasion of privacy against Wal-Mart and one or more unidentified Wal-Mart employees involved in developing and circulat-

8. *See Lake,* 582 N.W.2d at 234. *See generally* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy,* 4 HARV. L. REV. 193 (1890) (encouraging the recognition of the common law right to privacy).

9. 50 S.E. 68 (Ga. 1905). In *Pavesich,* the defendant made use of the plaintiff's name and picture in his life insurance advertising for his own benefit. *See id.* at 68-69.

10. *See id.* at 69-70.

11. *See Lake,* 582 N.W.2d at 234.

12. *See id.* at 234-35.

13. *See id.* at 232.

14. *See id.* at 232-33.

15. *See id.* at 233.

16. *See id.*

17. *See id.*

18. *See id.*

19. *See id.*

ing the photograph.[20] Lake and Weber claimed Wal-Mart invaded their seclusion, appropriated their likeness, published their private lives and placed them in a false light before the public.[21]

Wal-Mart argued that Lake and Weber's claims should be dismissed because Minnesota does not recognize a common law tort action for invasion of privacy.[22] The district court granted Wal-Mart's motion to dismiss the complaint for failure to state a claim upon which relief may be granted, concluding that Minnesota does not recognize the tort of invasion of privacy.[23] The court of appeals affirmed the finding of the district court, refusing to find a common law cause of action for invasion of privacy.[24] However, Judge Schumacher stated that Lake and Weber had a "colorable claim for invasion of privacy"[25] and he questioned Minnesota's reasons for not recognizing the tort.[26]

The Minnesota Supreme Court reversed in part and affirmed in part, justifying their decision by noting that "the court has the power to recognize and abolish common law doctrines."[27] Further, the court stated:

> As society changes over time, the common law must also evolve. . . . The right to privacy is inherent in the English protections of individual property and contract rights and the "right to be alone" is recognized as part of the common law across this country. Thus, it is within the province of the judiciary to establish privacy torts in this jurisdiction.[28]

With *Lake*, Minnesota joined the overwhelming majority of jurisdictions by recognizing the common law tort of invasion of privacy.[29] The court stated, "The right to privacy is an integral part of our humanity; one has a public persona, exposed and active, and a

20. *See id.*
21. *See id.*
22. *See id.*
23. *See id.*
24. *See* Lake v. Wal-Mart Stores, Inc., 566 N.W.2d 376, 378 (Minn. Ct. App. 1997).
25. *Id.*
26. *See id.*
27. Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 233 (Minn. 1998).
28. *Id.* at 234-35.
29. *See id.* at 235.

private persona, guarded and preserved. The heart of our liberty is choosing which parts of our lives shall become public and which parts we shall hold close."[30] The court further observed that "one's naked body is a very private part of one's person and generally known to others only by choice" and therefore, is a "privacy interest worthy of protection."[31] Specifically, the court recognized the torts of intrusion upon seclusion, appropriation, and publication of private facts.[32]

The court declined to recognize the tort of false light publicity because of their concern that "claims under false light are similar to claims of defamation, and to the extent that the false light is more expansive than defamation, tension between this tort and the First Amendment is increased."[33] For this reason, the false light publicity tort is widely criticized and is rejected by many jurisidctions.[34]

Justice Tomljanovich dissented, noting that Minnesota has never recognized a cause of action for invasion of privacy and the court "should be more even more reluctant now to recognize a new tort" because society has recently become "more litigious."[35] The legislature, in Justice Tomljanovich's opinion, should decide whether the tort of invasion of privacy should be recognized.[36]

B. Non-negligent Seller Liability in Product Liability Suit

Prior to *Marcon v. Kmart Corp.*,[37] Minnesota courts had not specifically held a seller, found to be without fault, strictly liable in a failure to warn case.[38] The Minnesota Court of Appeals in *Marcon* used a syllogism to logically reason that such liability should be im-

30. *Id.*
31. *Id.*
32. *See id.*
33. *Id.*
34. *See id. See, e.g.*, Sullivan v. Pulitzer Broad. Co., 709 S.W.2d 475, 480 (Mo. 1986) (refusing to recognize false light torts due to the resulting confusion and potential ancillary questions raised); Renwick v. News & Observer Pub. Co., 312 S.E.2d 405, 413 (N.C. 1984) (noting that false light claims would reduce judicial efficiency); Cain v. Hearst Corp., 878 S.W.2d 577, 583 (Tex. 1994) (stating that it is questionable whether remedies for non-defamatory actions should even exist).
35. *Lake*, 582 N.W.2d at 236 (Tomljanovich, J., dissenting).
36. *See id.*
37. 573 N.W.2d 728 (Minn. Ct. App. 1998), *review denied*, (Minn. Apr. 14, 1998).
38. *See id.* at 730.

posed on the seller.[39] Minnesota courts find manufacturers strictly liable for injuries caused by a design defect or a failure to warn.[40] Strict liability has been extended to sellers who sell defective products that harm the product's user, even if the seller was not negligent.[41] Thus, liability should be extended to sellers who sell defective products because they fail to warn, even if the seller was not found negligent.[42]

Luke Macron was sledding down a hill, on his knees, on a SnowMotion 760 plastic sled.[43] As Luke approached the bottom of the hill, the sled suddenly came to a stop after striking a bump and Luke was thrown from the sled.[44] As a result, Luke fractured his neck, leaving him a quadriplegic.[45] John Macron, as parent and guardian of Luke, commenced a product liability suit for strict liability failure to warn and negligent failure to warn against Paris Manufacturing Corporation, the manufacturer of the 760 plastic sled, and Kmart Corporation, the seller of the 760 plastic sled.[46]

At the district court level, the court allowed Marcon to include an independent claim against Kmart for failure to test.[47] At trial, Luke Marcon's mother testified that no instructions or warnings were on the sled.[48] The jury determined in a special verdict that "the sled was not defective because of its design, but was defective because it failed to provide adequate warnings or instructions for safe use."[49] The jury concluded "that the failure to warn caused Luke's injuries."[50] The jury also found that Paris Manufacturing was 100 percent liable for Luke's injuries and awarded $7,993,473.63 in compensatory damages.[51] The trial court accepted the jury verdict and separately determined that Kmart and Paris Manufacturing were jointly and severally liable.[52] The trial court

39. *See id.*
40. *See* McCormack v. Hankscraft Co., 278 Minn. 322, 333-34, 154 N.W.2d 488, 497 (1967).
41. *See* Farr v. Armstrong Rubber Co., 288 Minn. 83, 88, 179 N.W.2d 64, 68 (1970).
42. *See Marcon*, 573 N.W.2d at 730.
43. *See id.* at 729-30.
44. *See id.*
45. *See id.* at 730.
46. *See id.*
47. *See id.*
48. *See id.*
49. *Id.*
50. *Id.*
51. *See id.*
52. *See id.*

denied Kmart's motions for judgment notwithstanding the verdict or, alternatively, a new trial.[53] The trial court ordered judgment against Kmart and Paris Manufacturing in the amount of $8,314,893.96.[54] An insolvent Paris Manufacturing declared bankruptcy prior to the case.[55]

On appeal, the court first addressed the issue of whether Kmart could be held strictly liable when the jury found Kmart not negligent.[56] Kmart argued that it should not be held jointly and severally liable with Paris Manufacturing for damages because Marcon failed to prove that Kmart was negligent.[57] Generally, a nonmanufacturer defendant in a strict liability suit is relieved of its strict liability for injuries caused by a defective product over which it had no control.[58] However, the nonmanufacturer cannot be relieved of strict liability if the manufacturer of that defective product is unable to satisfy the judgment award.[59] Thus, the court found that because Paris Manufacturing declared bankruptcy before the present action was commenced, Kmart could not be relieved of its strict liability for injuries resulting from the sale of a defective sled.[60]

The *Marcon* court used a three-part test to prove strict liability.[61] In order to recover under strict liability, the plaintiff must establish: "(1) that the defendant's product was in a defective condition unreasonably dangerous for its intended use, (2) that the defect existed when the product left the defendant's control, and (3) that the defect was the proximate cause of the injury sustained."[62]

All of the elements for proving strict liability existed in *Marcon.*[63] First, the court noted that the jury determined that the sled was "in a defective condition, unreasonably dangerous to the user because the product failed to provide adequate warnings or in-

53. *See id.*
54. *See id.*
55. *See id.* at 730 n.1.
56. *See id.* at 730.
57. *See id.*
58. *See* MINN. STAT. § 544.41 (1998).
59. *See id.* § 544.41, subd. 2(d).
60. *See Marcon*, 573 N.W.2d at 731.
61. *See id.*
62. Bilotta v. Kelly Co., 346 N.W.2d 616, 623 n.3 (Minn. 1984). The *Bilotta* court derived the three part test from *Lee v. Crookston Coca-Cola Bottling Co.*, 290 Minn. 321, 329, 188 N.W.2d 426, 432 (1971).
63. *See Marcon*, 573 N.W.2d at 731.

structions for safe use."[64] Second, the jury determined that Kmart sold the 760 plastic sled involved in this case to Luke Marcon's parents.[65] Finally, the jury determined that the defective condition of the sled was proximate cause of Luke Marcon's injuries.[66]

Kmart argued that it was inconsistent to hold Kmart strictly liable when the jury found Kmart not negligent.[67] In addition, Kmart argued that it could not be held strictly liable for failure to warn since the jury found Kmart not negligent for failure to warn.[68] However, the court determined that Kmart wrongly interpreted the jury's finding that Kmart was not negligent to mean that it was not negligent for any failure to warn.[69] The court concluded that Kmart was only found not negligent in its failure to test; thus, the jury's finding that the product was defective because of a failure to warn was not inconsistent with holding Kmart strictly liable.[70]

The second issue the court addressed was whether Kmart could be held liable for more than four times the percentage of fault allocated to it by the jury pursuant to Minnesota Statutes section 604.02, subdivision 1.[71] Kmart argued that the statute bars the compensatory award because the jury found Kmart zero percent at fault; thus, Kmart claimed it should be liable for zero percent of the compensatory award.[72] However, the court determined that Minnesota Statutes section 604.02, subdivision 3[73] applied to this case because it arises from the manufacture and sale of a product,

64. *Id.*
65. *See id.*
66. *See id.*
67. *See id.*
68. *See id.*
69. *See id.* at 731-32. Also, the court determined that a finding that "Kmart was not negligent does not necessarily mean the jury concluded that Kmart was not negligent for its failure to warn" because Marcon brought multiple claims against Kmart. *Id.* Those claims included strict liability, negligent failure to warn, and a negligent failure to test. *See id.*
70. *See id.*
71. *See id.* Minnesota Statutes section 604.02, subdivision 1, provides in relevant part, "[A] person whose fault is 15 percent or less is liable for a percentage of the whole award no greater than four times the percentage of fault . . . ." MINN. STAT. § 604.02, subd. 1 (1998).
72. *See Marcon*, 573 N.W.2d at 732.
73. Minnesota Statutes section 604.02, subdivision 3 provides in relevant part that "[i]n the case of a claim arising from the manufacture, sale, use or consumption of a product, an amount uncollectable from any person in the chain of manufacture and distribution shall be reallocated among all other persons in the chain of manufacture and distribution . . . ." MINN. STAT. § 604.02, subd. 3 (1998).

and there is an uncollectable amount from the manufacturer.[74] Thus, the court concluded that the uncollectable amount from Paris Manufacturing should be reallocated to Kmart because Kmart was the only other party in the chain of manufacture and distribution.[75] Therefore, in product liability cases, subdivision 1 does not apply when subdivision 3 is applicable.[76]

Finally, the court addressed Kmart's last argument: that the trial court erred in presenting the failure-to-warn issue to the jury because there was no duty to warn.[77] Generally, when a manufacturer or seller knows, or should know, that a product might be used in a manner that will increase the risk not normally comprehended by the user, there is a duty to warn.[78]

The court determined that the record demonstrated that "Paris Manufacturing knew that children were using the sled in a kneeling position, that it should have known that this use could have increased the risk of injury, and that the risk was not comprehended by the user."[79] For these reasons, the court of appeals determined that the trial court was correct in submitting the issue to the jury.[80] Additionally, the court of appeals held that the trial court was correct in finding Kmart and Paris Manufacturing jointly and severally liable for the compensatory award.[81]

C. *"Other Persons" in the Civil Damage Act*

In *Lefto v. Hoggsbreath Enterprises, Inc.*,[82] the Minnesota Supreme Court held that "other person" in the Civil Damage Act[83] refers to

74. *See Marcon*, 573 N.W.2d at 732.
75. *See id.*
76. *See* Michael K. Steenson, *Joint and Several Liability: Minnesota Style*, 15 WM. MITCHELL L. REV. 969, 979 (1989) (stating that Minnesota Statutes section 604.02, subdivision 1 does not apply to product liability cases that fall under section 604.02, subdivision 3).
77. *See Marcon*, 573 N.W.2d at 732.
78. *See Bilotta*, 346 N.W.2d at 621.
79. *Marcon*, 573 N.W.2d at 733.
80. *See id.*
81. *See id.*
82. 581 N.W.2d 855 (Minn. 1998).
83. *See* MINN. STAT. § 340A.801, subd. 1 (1998). The Civil Damage Act provides in relevant part:

> A spouse, child, parent, guardian, employer, or other person injured in person, property, or means of support, or who incurs other pecuniary loss by an intoxicated person or by the intoxication of another person, has a right of action in the person's own name for all damages sustained

any person injured by the intoxication of another and who played no role in causing the intoxication.[84] Specifically, the court found that the fiancée of an automobile accident victim and the fiancée's daughter were "other persons" within the meaning of the statute.[85] Thus, these "other persons" were permitted to bring a cause of action under the Civil Damages Act against the vendor who illegally sold the alcoholic beverages to the driver.[86]

On August 28, 1993, Michael Lefto was riding in a car involved in a serious accident, which left him with severe injuries, including a closed head injury.[87] Hoggsbreath contributed to the accident and Michael Lefto's injuries by illegally selling liquor to the driver and Michael Lefto.[88] On the same day of the accident, Desiree Lefto and Michael Lefto were engaged to be married.[89] Desiree and Michael Lefto, along with Desiree Lefto's daughter, Nicole, had lived together for five years prior to the accident.[90] They had been combining incomes and sharing a joint checking account for the preceding two years.[91] In addition, they shared household costs and expenses, and jointly owned furniture and recreational property.[92]

After the accident, the Leftos were forced to sell their jointly owned home and Michael Lefto's truck because of the loss of Michael Lefto's income.[93] Desiree and Nicole's standard of living was reduced as a result of the accident.[94] Particularly, the court stated that Desiree and Nicole Lefto "have incurred expenses on the behalf of Michael Lefto; have received less support from Michael Lefto; and have not received the aid, comfort, and protection that

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against a person who caused the intoxication of that person by illegally selling alcoholic beverages. All damages recovered by a minor under this section must be paid either to the minor or to the minor's parent, guardian, or next friend as the court directs.

Id.

84. *See Lefto*, 581 N.W.2d at 857.
85. *See id.*
86. *See id.*
87. *See id.* at 856.
88. *See id.*
89. *See id.*
90. *See id.*
91. *See id.*
92. *See id.*
93. *See id.*
94. *See id.*

they would have received but for the accident."[95]

Desiree Lefto sued Hoggsbreath Enterprises, Inc. under the Civil Damage Act to recover for injuries resulting from Hoggsbreath's illegal sale of alcohol to the driver of the car.[96] The district court granted summary judgment in favor of Desiree and Nicole Lefto, concluding that they were within the class of people who were entitled to a cause of action under the Civil Damage Act.[97] The court acknowledged the importance of determining whether Desiree and Nicole Lefto were within the class of people entitled to a cause of action under the Civil Damage Act.[98] The court of appeals affirmed the district court's finding.[99]

Hoggsbreath argued that the "other person" Civil Damage Act language is ambiguous and the court should interpret it according to statutory construction and *ejusdem generis*.[100] Hoggsbreath contended that the phrase "other person" in the Civil Damage Act included only people with a legal relationship with the intoxicated person because the preceding people mentioned in the Act—spouse, child, parent, guardian, and employer—all have a legal relationship with the intoxicated person.[101] Hoggsbreath thus argued that Desiree and Nicole Lefto did not have a cause of action under the Act because they were not considered to be in a legal relationship with Michael Lefto at the time of the accident.[102]

In prior cases interpreting the phrase "other person" in the Civil Damage Act,[103] the Minnesota Supreme Court did not apply

95. *Id.*
96. *See id.*
97. *See id.*
98. *See id.*
99. *See id.*
100. *See id.* *Ejusdem generis* provides that "[g]eneral words are construed to be restricted in their meaning by preceding particular words." MINN. STAT. § 645.08, subd. 3 (1998).
101. *See Lefto*, 581 N.W.2d at 856.
102. *See id.* Further, Hoggsbreath argued that allowing Desiree and Nicole to bring suit under the Act would be against public policy because Michael Lefto and Desiree Lefto technically had no legal relationship and Minnesota does not recognize common law marriages. *See id.* at 856-57.
103. *See* Hannah v. Jenson, 298 N.W.2d 52, 54 (Minn. 1980) (holding that an on-duty police officer does not qualify as "other person"); Turk v. Long Branch Saloon, Inc., 280 Minn. 438, 159 N.W.2d 903, 905-06 (1968) (finding that an injured party who purchased alcohol for the tortfeasor minor is not "other person" under the Act); Empire Fire & Marine Ins. Co. v. Williams, 265 Minn. 333, 337, 121 N.W.2d 580, 583 (1963) (holding that an insurance company does not qualify as "other person"); Randall v. Village of Excelsior, 258 Minn. 81, 83-84, 103 N.W.2d 131, 133 (1960) (holding that a voluntarily intoxicated minor is not the

ejusdem generis.[104] The court concluded that "the term 'other person' refers to any other person injured by the intoxication of another and who played no role in causing the intoxication."[105] Thus, Desiree and Nicole were entitled to bring a civil action under the Civil Damage Act.[106]

The dissent, written by Justice Stringer and joined by Justice Tomljanovich, listed a parade of horribles invited by the majority's decision.[107] First, the dissent stressed that the statute says "other person" injured, not "any other person" injured.[108] Justice Stringer emphasized that because the majority held that the statute says "any other person," by adding the word "any," the majority "dramatically expands the scope of those intended by the legislature to have a claim for injury under the statute" and it provides "no limits to who can recover under the statute so long as damages can be proven."[109] Second, if the legislature intended the statute to apply to every person it would have included "any other person" in the statute.[110]

Finally, Justice Stringer argued that "rules of statutory construction require a narrow, cautious approach"[111] when the law is so penal in nature as the Civil Damage Act.[112] Justice Stringer stressed that the rule of statutory construction, *ejusdem generis*, should have been applied.[113] Further, the dissent argued that Desiree and Nicole Lefto are not entitled to bring suit under the Civil Damage Act because they had no relationship of dependency or legal relationship with the party injured at the time of the accident.[114]

D. Manufacturer Has No Duty to Protect Child from Unforeseen Accident

In *Whiteford v. Yamaha Motor Corp.*,[115] the Minnesota Supreme Court addressed the issue of foreseeable danger in a product liabil-

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"other person"); *see also Lefto*, 581 N.W.2d at 857 n.3.

104. *See Lefto*, 581 N.W.2d at 857.

105. *Id.*

106. *See id.* at 858.

107. *See id.* at 859 (Stringer, J., dissenting, joined by Tomljanovich, J.).

108. *See id.* at 858-59; *see also* MINN. STAT. § 340A.801, subd. 1 (1998).

109. *Lefto*, 581 N.W.2d at 858-59 (Stringer, J., dissenting, joined by Tomljanovich, J.).

110. *See id.* at 859. The dissent lists Utah, New York, and Alabama as states that have codified "any other person" into their Dram Shop statutes. *See id.* at 859 n.2.

111. *Id.* at 859.

112. *See id.*

113. *See id.* at 858.

114. *See id.* at 859.

115. 582 N.W.2d 916 (Minn. 1998).

ity case.[116] The court held that a snowmobile manufacturer could not have reasonably foreseen that a child would slide headfirst into a stationary snowmobile while tobogganing and suffer severe injuries when the child's face collided with a metal bracket on the underside of the snowmobile.[117] Because the danger was not reasonably foreseeable, the court held that the manufacturer had no duty to protect against such injuries.[118]

Generally, in Minnesota, a manufacturer has a duty to protect users of its products from reasonably foreseeable dangers.[119] That is, no duty exists unless the danger is foreseeable.[120] When the issue of foreseeability is clear, it should be decided by the court as a matter of law.[121] The jury should determine close questions on foreseeability.[122]

In *Whiteford*, Trent Whiteford and his mother, Rhonda Whiteford, brought a products liability action against Yamaha Motor Corporation claiming negligent design and manufacture of the Snoscoot snowmobile, negligent failure to warn of a dangerous condition, strict liability for defective design and failure to warn, and breach of warranty.[123] On January 11, 1992, Trent Whiteford, age five, collided headfirst with a stationary Yamaha Snoscoot snowmobile, which his older brother was operating, when tobogganing down a hill.[124] His face hit the leading edge of a metal bracket between the skis on the underside of the snowmobile.[125] Trent Whiteford suffered serious facial lacerations requiring surgery and leaving permanent disfigurement.[126]

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116. *See id.* at 918.
117. *See id.* at 919.
118. *See id.*
119. *See* Lovejoy v. Minneapolis-Moline Power Implement Co., 248 Minn. 319, 325, 79 N.W.2d 688, 693 (1956) (holding that questions for the jury existed as to whether a manufacturer should have reasonably anticipated that a tractor would operate at a speed faster than what is safe in low gear, and whether the manufacturer gave adequate warning of the potential dangers to the tractor users); *see also* Hauenstein v. Loctite Corp., 347 N.W.2d 272, 275 (Minn. 1984) (holding that in strict liability cases a manufacturer has a duty to warn all reasonably foreseeable users of its products).
120. *See* Lundgren v. Fultz, 354 N.W.2d 25, 28 (Minn. 1984) (holding that "[e]ven if the ability to control another exists, there is no duty to control that person unless the harm is foreseeable").
121. *See* Larson v. Larson, 373 N.W.2d 287, 289 (Minn. 1985).
122. *See Lundgren*, 354 N.W.2d at 28.
123. *See Whiteford*, 582 N.W.2d at 917.
124. *See id.* at 916.
125. *See id.* at 917.
126. *See id.*

At the district court level, Yamaha moved for summary judgment on all of the Whitefords' claims.[127] In response, the Whitefords provided an affidavit by a human factors expert claiming that the bracket on the underside of the snowmobile made the snowmobile unreasonably dangerous and that Trent Whiteford's injuries were foreseeable.[128] However, the district court concluded that the snowmobile did not create an unreasonable risk of harm and granted the summary judgment motion while dismissing the complaint.[129] The court of appeals, concluding that the Whitefords' expert created a general issue of material fact with respect to foreseeability, reversed in part and remanded the negligence and strict liability claims for trial.[130] Yamaha appealed to the Minnesota Supreme Court, arguing that they did not have a duty to protect Trent Whiteford because the accident was not reasonably foreseeable.[131] In addition, Yamaha argued that the human factors expert's affidavit did not create a genuine issue of material fact concerning the issue of foreseeability.[132]

The issue before the Minnesota Supreme Court was whether Trent Whiteford's accident was foreseeable enough to impose a duty on Yamaha to protect Whiteford against injury.[133] The court relied on analogous decisions from other jurisdictions that involved individuals who were injured by contact with stationary automobiles.[134]

The court reasoned that Yamaha has a duty to protect the snowmobile's user, and those who might be injured by the snowmobile's use or misuse, from foreseeable danger.[135] Trent White-

127. *See id.*
128. *See id.*
129. *See id.*
130. *See id.*
131. *See id.*
132. *See id.*
133. *See id.* at 918.
134. *See id.* at 918-19. The court, in its analysis, used the reasoning applied by the courts in several cases. *See* Schneider v. Chrysler Motor Corp., 401 F.2d 549, 558 (8th Cir. 1968) (holding that it was not foreseeable to the manufacturer that plaintiff's injury would occur given its obscure nature); Kahn v. Chrysler Corp., 221 F. Supp. 677, 679 (S.D. Tex. 1963) (holding that a manufacturer had no duty to design an automobile so that it would be safe for a child to ride into when parked); Hatch v. Ford Motor Co., 329 P.2d 605, 607 (Cal. 1958) (holding that a manufacturer could not be held negligent for designing an automobile with a radiator ornament where the plaintiff ran into it).
135. *See Whiteford*, 582 N.W.2d at 919. The court used the reasoning in *Hatch*, in which the plaintiff, age six, punctured and lost an eye when he ran into the

ford was not using or misusing the snowmobile.[136] The snowmobile was stationary and not in use when Trent Whiteford slid his toboggan into it.[137] The Minnesota Supreme Court found that "the danger here was too remote to impose a duty on Yamaha and was not one which Yamaha was required to anticipate or protect against."[138] Thus, the court agreed with the district court and held that Yamaha could not reasonably have foreseen the accident that caused Trent Whiteford injuries.[139]

The court further noted that the human factors expert's affidavit, which asserted that a design defect existed and that Trent Whiteford's injuries were foreseeable, did not create any genuine issue of material fact because it did not "change the fact that the Snoscoot was stationary and was not being operated at the time of the accident."[140] In addition, the court concluded that the safe toy statute[141] did not create a cause of action in this case because the Snoscoot was stationary and not being operated at the time of the accident.[142]

The dissent by Justice Gilbert asserted that the majority's decision ignored the statutory definition of a mechanical hazard provided in Minnesota Statutes section 325F.08, the safe toy statute.[143] The dissent also criticized the majority's reliance on cases from other jurisdictions because Whiteford's accident was not similar to those cases.[144] Justice Gilbert asserted that a fact question had been

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sharp radiator ornament of a parked automobile manufactured by the defendant. *See Hatch*, 329 P.2d at 606. The *Hatch* court found that the automobile could cause no harm "except to one whose own acts or the acts of some third person caused him to collide with it." *Id.* at 607. The *Hatch* court held that the defendant was not required to anticipate or protect against the plaintiff's accident. *See id.*

136. *See Whiteford*, 582 N.W.2d at 919. Here, the court relies on the reasoning in *Kahn*, which held that the automobile manufacturer has no duty to design the automobile that will be safe for a person to ride a bicycle into while it is parked. *See Kahn*, 221 F. Supp. at 679.

137. *See Whiteford*, 582 N.W.2d at 919.

138. *Id.* Accordingly, the court found that the district court was correct in dismissing the Whitefords' claims. *See id.*; *see also Schneider*, 401 F.2d at 557 (holding that a "manufacturer is not an insurer and cannot be held to a standard of duty of guarding against all possible types of accidents and injuries").

139. *See Whiteford*, 582 N.W.2d at 919.

140. *Id.* at 919 n.22.

141. *See* MINN. STAT. §§ 325F.08-09 (1998).

142. *See id.* at 919 n.23.

143. *See id.* at 919 (citing MINN. STAT. §§ 325F.08-09) (Gilbert, J., dissenting).

144. *See id.* Justice Gilbert noted that this case was not similar to *Hatch*, *Kahn*, or *Schneider* because it involved a snowmobile, not a parked car, and the snowmobile was not parked and left unattended. *See id.*

created by the Whitefords' expert, who testified that the snowmobile had been negligently designed, thus creating an unreasonable risk of personal injury.[145] Justice Gilbert further stated that it was "quite foreseeable that the other winter recreational activities such as tobogganing may have been taking place near the snowmobile."[146]

E. Vicarious Official When Official Not Named in Suit

In *Wiederholt v. City of Minneapolis*,[147] the Minnesota Supreme Court "explicitly" held that a governmental employer may invoke the doctrine of official immunity whether or not the individual official whose discretion is at issue was named as a defendant in the suit.[148]

On June 16, 1993, a Minneapolis city sidewalk inspector, during a routine inspection, marked a projecting sidewalk for repair one month prior to Wiederholt's accident.[149] The inspector could have flagged the sidewalk for immediate repair; however, immediate repairs were usually only ordered once or twice a year.[150] The inspector placed no warning device at the defective sidewalk.[151]

On July 12, 1993, the sidewalk inspector issued the owner of the adjoining property written notice of the projecting sidewalk pursuant to city policy.[152] In the notice, the adjoining property owner was given the option to either repair the sidewalk within two weeks or have the city repair the sidewalk at the owner's cost.[153]

On July 18, 1993, before the repair period ended, Ronald Wiederholt tripped on the projecting sidewalk slab in south Minneapolis while he was in-line skating.[154] Wiederholt's skate hit a raised portion of the sidewalk that was 1 1/2 to 2 inches higher than the adjacent slab.[155] The property owner did not repair the

145. *See id.* at 920. Justice Gilbert lists other factual disputes that should have gone to the jury. *See id.*
146. *Id.*
147. 581 N.W.2d 312 (Minn. 1998).
148. *See id.* at 316-17.
149. *See id.* at 315.
150. *See id.*
151. *See id.*
152. *See id.*
153. *See id.* at 316; *see also* MINNEAPOLIS, MINN., CODE OF ORDINANCES, ch. 8, § 12 (1997).
154. *See Wiederholt*, 581 N.W.2d at 314.
155. *See id.* According to the city sidewalk division's written policy, all sidewalks projecting more than one inch above the adjacent slab are considered a

sidewalk, and the city ultimately made the repairs in October 1993.[156] According to the Minneapolis Code, the city of Minneapolis has a duty "to construct, reconstruct and maintain in good repair" the city's sidewalks.[157] The code further requires the "immediate repair" of any broken sidewalk.[158]

Wiederholt brought an action against the city of Minneapolis alleging that the city was negligent for failing to repair the sidewalk immediately upon notice or to provide warning of the broken sidewalk.[159] At trial, the city of Minneapolis moved for summary judgment claiming that it was entitled to vicarious official immunity because the sidewalk inspector was entitled to official immunity.[160] The district court granted the motion.[161] The court of appeals reversed the summary judgment motion because the sidewalk inspector was not named as a defendant in Wiederholt's lawsuit; therefore, the city was not entitled to vicarious official immunity because the inspector did not need the protection of official immunity.[162]

On review, the Minnesota Supreme Court first considered whether the sidewalk inspector was entitled to official immunity.[163] The common law official immunity doctrine provides that a public official who has legal duties that employ the use of personal judgment or discretion is not personally liable to an individual for damages unless the official acts intentionally or maliciously.[164] Thus, official immunity protects public officials from liability for their

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hazard and must be repaired. *See id.*

156. *See id.* at 315.

157. MINNEAPOLIS, MINN., CODE OF ORDINANCES ch. 8, § 12 (1997).

158. *Id.* § 13. In Minneapolis, the sidewalk division of the department of public works performs all sidewalk inspection and repair. *See Wiederholt*, 581 N.W.2d at 314. Three inspectors are in charge of inspecting approximately 2000 miles of sidewalks. *See id.* Three contractors work all summer to repair sidewalk defects. *See id.*

159. *See Wiederholt*, 581 N.W.2d at 314. The district court granted summary judgment in favor of the city. *See id.* On appeal, the parties stipulated to a dismissal of the cause of action against the property owner. *See id.*

160. *See id.* at 314.

161. *See id.*

162. *See id.*

163. *See id.*

164. *See* Elwood v. Rice County, 423 N.W.2d 671, 677 (Minn. 1988) (holding that public officials charged with duties which require the exercise of judgment are immune from personal liability unless they committed a willful or malicious offense); Sulsa v. State, 247 N.W.2d 907, 912 (Minn. 1976) (finding that "a public official charged by law with duties which call for the exercise of judgment or discretion is not personally liable to an individual for damages unless he is guilty of a willful or malicious wrong").

discretionary actions or decisions conducted in performance of their official duties.[165] Official immunity relieves public officials from "the fear of personal liability" that might impair their official duties or independent actions.[166]

In an official immunity case, only discretionary actions are immune from liability; therefore, the court first determined whether the individual official's actions were discretionary or ministerial.[167] In deciding this issue, the court concluded that "[o]nce the sidewalk inspector identified the broken slab, his duty to have the sidewalk immediately repaired was clearly ministerial in nature because it was 'simple and definite,'[168] dictated by the city's own written policy."[169] In addition, the court found that the inspector's action involved no discretion and was "'absolute, certain, and imperative, involving merely an execution of a specific duty.'"[170] Therefore, the court held that the sidewalk inspector was not entitled to official immunity for his delay in ordering the repair of the sidewalk.[171]

The court further held that the city of Minneapolis was not entitled to vicarious official immunity[172] because the sidewalk inspector did not have official immunity for his ministerial duty.[173] In doing so, the court clarified its prior stance made in *Watson ex rel. Hanson v. Metropolitan Transit Commission*[174] by explicitly holding that a governmental employer may invoke the doctrine of official immunity whether or not the individual official whose discretion is at issue was named as a defendant in the suit.[175] Otherwise, the court noted, if the governmental employer was not entitled to vi-

165. *See* Janklow v. Minnesota Bd. of Examiners for Nursing Home Adm'rs., 552 N.W.2d 711, 716 (Minn. 1996).

166. *See Elwood*, 423 N.W.2d at 678.

167. *See Wiederholt*, 581 N.W.2d at 315.

168. Williamson v. Cain, 245 N.W.2d 242, 244 (Minn. 1976) (defining a ministerial duty as "simple and definite").

169. *Wiederholt*, 581 N.W.2d at 316.

170. *Id.* (quoting Cook v. Trovattan, 200 Minn. 221, 224, 274 N.W. 165, 167 (1937)).

171. *See Wiederholt*, 581 N.W.2d at 316.

172. Vicarious official immunity protects the government employer from liability based on the official immunity of its employee. *See Wiederholt*, 581 N.W.2d at 316. Generally, if the employee has official immunity, the suit against government employer is dismissed without explanation. *See* Pletan v. Gaines, 494 N.W.2d 38, 42 (Minn. 1992).

173. *See Wiederholt*, 581 N.W.2d at 316.

174. 553 N.W.2d 406, 415-16 (Minn. 1996).

175. *See Wiederholt*, 581 N.W.2d at 316-17.

carious official immunity just because the official was not named a defendant in the suit, the plaintiff could always defeat the immunity by not naming the official as a defendant.[176]

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176. *See id.* at 317.